IV. During the rebellion the ordinary laws of war as to enemy's country were, by the general policy of the Government, sanctioned by Congress and the President's proclamation of August 16th 1861, so far modified that in such parts of the rebel states as were permanently occupied and controlled by the Union military forces, and where rebellion had ceased and was no longer probable, the Government assumed to interfere no further with the rights of person and property of the enemy than should be required by necessary subjection to military government.

But this immunity only extends to those who were loyal, or who ceased to engage in, aid or encourage rebellion. And in such case property would be liable to be occupied, taken, damaged or destroyed, as in loyal states.[52]

WM. LAWRENCE.

(To be continued.)

RECENT AMERICAN DECISIONS.

Court of Appeals of Maryland.

SAMUEL D. LEWIS *v.* BALTIMORE & OHIO RAILROAD COMPANY.[1]

Where the plaintiff has been guilty of a plain act of carelessness which has contributed to an accident, it is the duty of a court as matter of law, to say that he cannot recover.

Plaintiff desiring to cross a street in Baltimore, after dark, the street lamps being lighted, found a train of railroad cars blocking the crossing. A crowd had collected waiting for an opportunity to cross, and while plaintiff was waiting two women had been prevented by the police from creeping under the couplings, but several persons had climbed up the platforms and thus crossed. After waiting about five minutes plaintiff started to get on the platform with the intention of

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No flag of truce could protect such bonds—which have invariably heretofore been held as illegal and disloyal publications, intended to give aid and comfort to the enemy—from confiscation and destruction. On the contrary, a party availing himself of a flag of truce to bring such securities within our lines would be guilty of a violation of the truce, and become amenable to trial and punishment."

[52] *The Venice*, 2 Wallace 259; *Planters' Bank* v. *Union Bank*, 16 Wallace 483. See letter of February 26th 1874, of Quartermaster-General M. C. Meigs, in appendix to Lawrence's report on War Claims, 1st sess. 43d Cong.; Senate Claims Committee's Report, No. 85, 2d sess. 42d Cong., March 27th 1872; *Mrs. Alexander's Cotton*, 2 Wallace 419; *Prize Cases*, 2 Black 674; Senator Carpenter in Senate, March 19th 1874.

[1] We are indebted for this case to F. C. Latrobe, Esq.—ED. AM. L. REG.

crossing in the same manner, when the train started and his leg was crushed between two cars. *Held*, that such an act was contributory negligence and he could not recover.

The fact that the railroad company was negligent in thus blocking a street crossing contrary to the city ordinances, did not relieve plaintiff from the duty to use ordinary care to avoid danger.

THIS was an action to recover damages for injuries alleged to have been caused by the negligence of the defendant.

The facts were as follows: Between six and seven o'clock of the evening of January 14th 1871, the appellee, by its agents, was engaged in making up a train of freight cars on the line of Howard street, north and south of Camden street, preparatory to its leaving the city. The engine was attached to the south end of the train, some distance below Camden street, and was backing or passing the cars up Howard to couple with cars north of Camden. The plaintiff being at the depot of the defendant, whither he had gone to take the train for Washington, started to go to the Fountain hotel, on the north side of Camden street, a short distance from the corner of Howard. Arriving at the corner of Howard and Camden, he found the crossing blocked by the freight cars of the defendant. He did not see the engine attached to the train, although the street-lamps were lighted, but he admits he did not look particularly for it, nor did he see any employees of the defendant at or about the crossing. The street had been blocked by the cars from twenty-five to thirty minutes, and a number of persons had collected at the crossing waiting for the train to move. The plaintiff waited from five to seven minutes, during which time he saw several persons climb up to the platform of one of the cars, and thus pass to the opposite side of the street; he also saw the police stop two women who were attempting to crawl under the coupling of the cars. Finally, he determined to climb over the platforms of the two cars, and taking hold of the handle used for getting on the cars, while in the act of pulling himself up, with one foot on the platform, and the other hanging down, the train suddenly moved, and his leg was caught and crushed between the two cars. The plaintiff also read at the trial certain ordinances of the city for the purpose of showing that the defendant was making up the train and blocking up the crossing in a manner prohibited by the same.

The opinion of the court was delivered by

ROBINSON, J.—The court, in granting the defendant's and in

refusing the plaintiff's prayers, instructed the jury substantially, that the plaintiff had by *his own negligence contributed to the injury*, and was not, therefore, entitled to recover. We fully agree with the counsel for appellant, that in cases of this kind, the question of negligence, as a general rule, is a matter for the determination of the jury, under instructions from the court defining the degree of care required of each party, according to the nature of the relations borne by the defendant to the party injured.

But we have said more than once, "that cases may and do sometimes occur, where the court is required to declare some *plain act of carelessness* on the part of the plaintiff, to be in *law* such contributory negligence as will prevent a recovery, or, on the other hand, where the proof of negligence on the part of the defendant is so slight and inconclusive in its nature as to demand from the court an instruction as to its legal insufficiency to prove negligence, in order to prevent the jury from indulging in *wild speculation or irrational conjecture.*"

In this, as in all other cases, the burden of proof is on the plaintiff, and although it is the province of the jury to decide matters of fact, when evidence legally sufficient for that purpose is submitted to their consideration, yet this *legal sufficiency* is a question of law, of which the court is the *exclusive judge*, and where the testimony is so slight and inconclusive that no rational mind can infer from it the fact which it is offered to establish, it is not only the right, but the duty of the court, when applied to for that purpose, to instruct the jury that there is no evidence before them to warrant their finding the fact sought to be established.

Without reviewing the many cases in which the subject of negligence has been considered, the question in this and in all cases of the like kind, is whether the injury complained of was caused *entirely by the negligence or improper conduct of the defendant*, *or* whether the plaintiff so far contributed to the same by *his own negligence or want of ordinary care and prudence*, that but for such negligence or want of care and prudence the injury would not have happened. In the first case the plaintiff would be entitled to recover, in the latter he would not, unless the *defendant*, *by the exercise of care and prudence*, might have avoided the consequences of the *plaintiff's negligence*. The rule thus laid down in *Tuff* v. *Warman*, 94 E. C. L. Rep. 583, avoids the distinction between *remote* and *proximate causes*, a subject which PIGOTT, C. B., says

has perplexed metaphysicians from the days of the disquisitions of the schoolmen down to the essays of Hume and Browne, and presents the law in clear and intelligent terms, suited to the capacities of men of good common sense and ordinary information.

The question in this appeal resolves itself then into this: was the attempt on the part of the plaintiff to get on the platform of the cars, *under the circumstances, such a glaring act of carelessness* as to amount in law to *contributory negligence?* To this, we think, there can be but one answer. On reaching the crossing at Camden and Howard, instead of waiting until the train had moved, or walking up to Pratt street, the distance of a square only, where he could have crossed without risk, he attempted, although it was dark, to get on the platform of one of the cars, at a time, too, when the defendant was making up its freight-train, and without even looking or inquiring whether an engine was attached thereto. For such negligence it is no excuse to say that he had seen five or six of the crowd of persons there collected make a like attempt without injury, and especially in the face of the admonition given by the police, who, in the very presence of the plaintiff, had prevented two women from exposing themselves to a danger so imminent. The ordinary care which the law required, is the exercise of such caution and prudence as are proportioned to the danger to be avoided, judged by the standard of common prudence and experience. Tested by this standard, the conduct of the plaintiff in thus exposing himself to a danger so threatening, can be viewed in no other light than as an act of carelessness, amounting in law to *contributory negligence.*

But it was also contended that the plaintiff is not prevented from recovering, if the defendant, by the exercise of ordinary care, might have avoided the consequences of the plaintiff's negligence. An action, it is true, will lie in some cases where there has been negligence on both sides, but in such it must appear that the defendant, by a proper degree of caution, might have avoided the *consequences of the plaintiff's negligence,* or, that the latter could not, by ordinary care and prudence, have avoided the consequences of the defendant's negligence. "This, moreover, implies time for the party to become aware of the conduct and situation of the other, for neither could be required to anticipate the other's negligence:" *Northern Central Railway Co.* v. *State, use of Gies,* 31 Md. 366. A man asleep on the highway, or walking, negligently

it may be, upon a railroad-track, is not to be run over, provided it can be avoided by the exercise of ordinary care. Or take the case of a vessel failing to exhibit the proper lights and to take the right side of the channel, as required by the Navigation Act; such acts of negligence are no defence in a suit against a colliding vessel, provided the latter being aware of the negligence of the former, could have avoided the collision by the exercise of ordinary care. Where, however, there is no opportunity for one party to become aware of the negligence of the other, and the injury is occasioned by the concurrent and co-operating negligence of both, it is well settled that no action will lie. In the case before us, if it be conceded there was negligence on the part of the defendant in the use of the engine, at the time of the injury, it is equally clear there was concurrent negligence on the part of the plaintiff in attempting to get on the platform of the car, and although the crossing was temporarily blocked, it cannot be imputed as negligence to the agents of the defendant, that they did not anticipate such recklessness on the part of the plaintiff. After the attempt was made to get on the cars, it was impossible for the defendant to have avoided the injury by the exercise of ordinary care, because there was no interval of time during which the agents of the latter could become aware of the danger to which the plaintiff was exposed.

Then, on the other hand, so far as regards the *prior acts of negligence* of the defendant, such as using an engine on the track in the city, and blocking the crossings in a manner prohibited by the city ordinances, it is very clear that such acts of negligence did not exempt the plaintiff from the use of ordinary care in order to avoid the consequence of the defendant's negligence. The fact that a train of cars is unlawfully blocking a crossing is no reason why a person should throw himself under the wheels, or recklessly expose himself to danger. He is bound, notwithstanding such acts of negligence, to exercise proper care and prudence, and if he fails to do so, he cannot hold another responsible for an injury which may be fairly traced to his own negligence.

In any aspect, therefore, in which this case may be considered, we are of opinion, there was *contributory negligence on the part of the plaintiff*, and that the judgment below ought to be affirmed.

Judgment affirmed.

Rauch v. *Lloyd*, 31 Pa. St. 358, bears a close resemblance to the principal case. There the plaintiff, a lad of six or seven years, was on his way home, when he

found his way blocked at a public crossing by a long train of cars, without any person in charge. He attempted to creep under the cars, the cars were moved, and he was injured. The jury found for the defendants, apparently on the ground of contributory negligence. The Supreme Court, however, reversed the judgment, holding that the cars were unlawfully upon the public crossing, and that, considering the age of the child, and the other circumstances of the case, no negligence could be imputed to him. WOODWARD, J., said, *obiter*, in delivering the opinion of the court, "I quite agree with the learned judge that if the plaintiff had been an adult of ordinary prudence and discretion, he would have no right of action; for, however blameworthy the defendants may have been in leaving their cars on the crossing, common prudence would have restrained him from attempting to pass under them, and an adult would be bound to use common prudence."

In the principal case, the court held the act of the plaintiff to be "an act of carelessness amounting in law to *contributory negligence.*" The question of negligence having generally been considered a question of fact to be determined by the jury under the circumstances of each case, it may be worth while to examine briefly the decisions in the different state and the Federal and English courts, to learn how far there has been a departure from this rule.

NORTH CAROLINA.—In *Herring* v. *Wil. & Ral. R. Co.*, 10 Ired. 402, it is said, "What amounts to negligence is a matter of law." So also *Avera* v. *Sexton*, 13 Ired. 253; but this statement cannot be taken in its broadest sense, for, in *Lambeth* v. *N. C. R. Co.*, 66 N. C. 494, it was held that the question of contributory negligence was one of fact for the jury, acting under the instructions of the court. "The testimony was conflicting in material points, and it was the province of the jury to determine the truth of the matter * * * in accordance with the instructions of his Honor on the questions of law arising upon the ascertained facts." The act of the plaintiff in jumping from a train in motion was held, under the circumstances of the case, not to be negligence in law.

In *Anderson* v. *Steamboat Co.*, 64 N. C. 399, READE, J., said, "The facts being ascertained, negligence is a question for the court. When the testimony is all on one side, or is not contradictory, the court can decide whether there is or is not negligence." In *Biles* v. *Holmes*, 10 Ired. 16, it was said, "What amounts to ordinary care is for the court. The judge below erred in leaving it to the jury. Whether the proofs establish certain facts is for the jury; but what is the legal effect of these facts, supposing them to exist, is for the court." See also *Ellis* v. *P. & R. R. Co.*, 2 Ired. 140; *Heathcock* v. *Pennington*, Id. 640.

MINNESOTA.—*St. Paul* v. *Kirby*, 8 Minn. 154, was an action for injuries arising from a defective sidewalk. The court said the weight of authority is clearly that the question of negligence in cases of this kind is mainly one of fact for the jury, and none of the cases go further than that it is a mixed question of law and fact, which should be submitted to the jury. In *Johnson* v. *Winona & St. P. R. Co.*, 11 Minn. 96, it was said:—"Whether under the circumstances in which the plaintiff was situated it was negligence, is a mixed question of law and fact. Negligence and prudence are relative terms, qualified by the country, the age, the relations and circumstances in which an act is done or omitted. The law can give no certain fixed standard by which a jury shall be governed in inquiries of this character, for the simple reason that there is none. * * These questions are eminently practical, and

are, says Story, 'more questions of fact than law.'" So also *Griggs* v. *Fleckenstein*, 14 Minn. 81.

OHIO.—*Jenkins* v. *Little Miami R. Co.*, 2 Disney 51.

MISSOURI.—*Smith* v. *Hann. & St. Jo. R. Co.*, 37 Mo. 292; *O'Flaherty* v. *Union R,. Co.* 40 Mo. 70; *Morrisey* v. *Wiggins Ferry Co.*, 43 Mo. 380; 47 Mo. 523. It has been there held (*Boland* v. *Missouri R. Co.*, 36 Mo. 491) that where the evidence is all one way, the court may determine the whole case as a question of law; and that the credibility of witnesses and the weight of evidence are for the jury; but whether there is any evidence, or what its legal effect may be, is to be decided by the court. As to railroad crossings at grade, see *Tabor* v. *Mo. Valley R. Co.*, 46 Id. 353.

MAINE.—In *Storer* v. *Gowen*, 6 Shep. 174, it was held that the judge below erred in deciding as a matter of law that it was negligence for a bailee to deliver a valuable package to a servant eleven years old. In *Stuart* v. *Inh. of Machias Port*, 48 Maine 477, an action for a defect in a highway, it was held not to be proper to instruct the jury that if they found that the plaintiff was intoxicated at the time of injury, he could not recover. So also *Stratton* v. *Staples*, 59 Id. 94. Whether or not the loud and sudden blowing of a steam-whistle as a signal for starting a train, whereby plaintiff's horse was frightened, was ordinary care, was left to the jury in *Hill* v. *Portland & Roch. R. Co.*, 55 Maine 438.

LOUISIANA.—Questions of negligence are ordinarily for the jury, but where, in an action for injuries received while getting upon a train in motion, the jury found a verdict for plaintiff, the court reversed the judgment and entered judgment for the defendant, not allowing the case to go to another jury: *Knight* v. *Ponchartrain R. Co.*, 23 Lou. An. 462; *Lesseps* v. *Same*, 17 Lou. R. 361; *Fleytas* v. *Same*, 18 Id. 339; *Carlisle* v. *Holton*, 3 Lou. An. 48.

SOUTH CAROLINA.—Where the slave of the plaintiff lay down on a railroad track amid grass so high as to obstruct a view of him for more than twenty feet, and in this situation was killed, a verdict for the plaintiff was set aside, a new trial refused, and a nonsuit ordered: *Felder* v. *L. C. & C. R. Co.*, 2 McMullan 403. In *Zemp* v. *Railway Co.*, 9 Rich. 94, after a full discussion of authorities, it was held that "what amounts to negligence is a question of law after the facts are ascertained; but that as the jury are to ascertain the facts it becomes a mixed question of law and fact. The judge must tell the jury what is negligence; it is for them to say, in *most cases*, whether the facts sustain the definition." See also *Danner* v. *S. C. R. Co.*, 4 Rich. 329.

CALIFORNIA.—In *Innis* v. *The Senator*, 1 Cal. 459, it was held that for a vessel at anchor in a channel during the night not to exhibit a light is negligence *per se.*

Gerke v. *Cal. Nav. Co.*, 9 Cal. 251, was an action for injury done to plaintiff's crops through the use of improperly-constructed chimneys on the defendant's boat. Said the court, "What facts and circumstances constitute evidence of carelessness is a question of law for the courts to determine. But what particular weight the jury will give to these facts and circumstances is a matter for the jury." In *Wolf* v. *Water Co.*, 10 Cal. 545, the court left the case to the jury on the question as to whether the defendant acted as ordinarily prudent men do in their own concerns. It was held in *Richmond* v. *Sacr. Val. R. Co.*, 18 Cal. 358, that "whether due diligence or negligence has been shown is a question for the jury, depending upon the particular circumstances." Where the plaintiff, a lad of sixteen years, got upon a train in motion to steal a ride

and was sharply ordered off by the conductor, and, in jumping from the train while moving, was injured, the court said, "Had the plaintiff been a man, of mature age and discretion, it might be said, *judicially*, by the court, * * that he had no one to blame but himself; but being a boy only sixteen years of age, we think it should have been left to the jury to say whether in this case the sharp command of the conductor, accompanied by a show of force, did not, under all the circumstances, amount to compulsion." In *Karr* v. *Parks*, 40 Cal. 188, it was held not to be negligence in law to allow a child of five years of age to go unattended in an unused street near its father's house; and in *Seigel* v. *Eisen*, 41 Cal. 109, the court refused to consider it negligence in law to ride upon the rear platform of a street car.

KANSAS.—Negligence is a question of fact for the jury, both as to its existence and its nature and degree. But it is for the court to determine the measure of duty resting upon the parties, and, when the facts are found or agreed upon, to pronounce upon the question of negligence as a matter of law. *Union Pac. R. Co.* v. *Rollins*, 5 Kan. 180; *Kansas Pac. R. Co.* v. *Butts*, 7 Id. 315; both well considered cases.

IOWA.—*Greenleaf* v. *Ill. Cent. R. Co*, 29 Iowa 15, was an action for injury to a brakesman by defendants' alleged negligence. WRIGHT, J., in delivering the opinion of the court, assumed that "whether a party has or has not been guilty of negligence in a particular case, is a question of mingled law and fact, but when the facts are undisputed or conclusively proved, the question of negligence must as a rule be decided by the court." This case was followed in *Greenleaf* v. *Dubuque & Sioux City R. Co.*, 33 Id. 52. In *Keese* v. *Chicago & N. W. R. Co.*, 30 Id. 81, it was held not negligence *per se* to allow dry grass and weeds to remain on a railroad track, whereby fire was communicated to plaintiff's haystack. See also *Haley* v. *Same*, 21 Id. 26, and *Donaldson* v. *Miss. & Mo. R. Co.*, 18 Id. 289.

INDIANA.—Where the plaintiff's cow, running at large, was killed by the defendants' locomotive (*Ind. & Cinn. R. Co.* v. *Caldwell*, 9 Ind. 397), it was held that the case presented a question of fact for the jury under legal instructions; the facts having been found, the court drew the inference of inexcusable negligence. So to allow stock to pasture in a field, the fence of which included a section of defendants' railroad track, was held to be negligence in law: *Ind. Pitts. & Clev. R. Co.* v. *Brownenburg*, 32 Id. 199. When the facts are undisputed, negligence is a question of law: *Gagg* v. *Vetter*, 41 Id. 228. As to railroad crossings at grade, see *Bellefontaine R. Co.* v. *Hunter*, 33 Id. 355.

NEW JERSEY.—*N. J. R. Co.* v. *West*, 4 Vr. 430, was a case where the plaintiff was injured by the negligent running of defendants' car past a street crossing *Held*, on appeal for refusal to nonsuit, that when the facts are clear and undisputed and show a want of ordinary care on the part of the plaintiff, the question should be decided by the court; but if the evidence is doubtful it is for the jury to decide. So in *Central R. Co.* v. *Moore*, 4 Zabr. 268, 824.

MISSISSIPPI.—In *Dix* v. *Brown*, 4 Miss. 131, the case was left to the jury to find the facts under the evidence.

KENTUCKY.—*Green* v. *Hollingsworth*, 5 Dana 173, was detinue for a watch loaned and lost. *Held* to be the province of the court to decide what was gross, ordinary and slight neglect under the circumstances, and of the jury to find whether the facts established negligence. In *Matheny* v. *Wolffs*, 2 Duv. 137, the plaintiff was injured by falling into an excavation carelessly left open by defendant. *Held*, that the degree of prudence required of plaintiff was hard

to define, and should be left to the jury. See also *Louisv. & Nash. R. Co.* v. *Collins*, Id. 114.

PENNSYLVANIA.—The numerous decisions in this state seem to have settled most points that can arise. "The law is well settled that what is, and what is not, negligence in a particular case, is generally a question for the jury and not for the court. It is always a question for the jury when the measure of duty is ordinary and reasonable care. In such case the measure of duty is not fixed, but variable. Under some circumstances a higher degree of care is demanded than under others. And when the standard shifts with the circumstances of the case it is, in its very nature, incapable of being determined as a matter of law, and must be submitted to the jury to determine what it is, and whether it has been complied with": WILLIAMS, J., in *West Chester & Phila. R. Co.* v. *McElwee*, 67 Pa. St. 315. See also *McCully* v. *Clark*, 40 Id. 406, per STRONG, J.; *Glassey* v. *Hestonville Pass. R. Co.*, 57 Id. 174; *Penna. R. Co.* v. *Barnett*, 59 Id. 264. It was said in *Catawissa R. Co.* v. *Armstrong*, 52 Id. 286, that what acts and conduct constitute negligence, or rather whether a given state of facts constitutes negligence, was generally a question of law; and in *Pitts., F. W. & C. R. Co.* v. *Evans*, 53 Id. 254, that "special verdicts are the best machinery for determining railroad cases, because they give all the facts, both those disputed and those undisputed, whereupon negligence becomes purely a question of law." However, in a later case, *Penna. Canal Co.* v. *Bentley*, 66 Id. 34, it was said by Mr. Justice SHARSWOOD—citing *McCully* v. *Clark*, *supra*, "It is said that the facts were not disputed, and that upon the undisputed facts negligence was a question of law. There is no such principle, except where a man violates a plain legal duty;" and this seems to be the better opinion and the existing rule in this state. Such being the general rules, there have been said to be two classes of exceptions, in which negligence becomes a question of law: 1st. Where the standard or measure of duty is defined by law, and is the same under all circumstances; 2d. Where there is such an obvious disregard of duty and safety as amounts to misconduct, *W. C. & P. R. Co.* v. *McElwee*, *supra*; *N. P. R. Co.* v. *Heilman*, 49 Pa. St. 63; *Glassey* v. *Hestonville &c. R. Co.*, *supra*. The following are cases of negligence *per se*: *Reeves* v. *Del., Lack. & West. R. Co.*, 30 Id. 454, *held*, that it was negligence for a train to approach a public crossing, on a curve and through a deep cut, at a high rate of speed. *Powell* v. *Penna. R. Co.*, 32 Id. 414, *held* negligence in defendants to use straw for bedding stock in cars where there was exposure to sparks from the locomotive. *Penna. R. Co.* v. *Zebe*, 33 Id. 318, where the plaintiff's son stepped off the cars on the side opposite the platform, and was killed by a passing train. See also *Penna. R. Co.* v. *Ogier*, 35 Id. 60, citing *Reeves* v. *D. L. & W. R. Co.* and *Penna. R. Co.* v. *Zebe*, *supra*. *Citizens' Ins. Co.* v. *Marsh*, 41 Id. 395; *held* negligence, or rather misconduct, for the captain of a steamboat, racing on the Mississippi, to stand a barrel of oil of turpentine near the furnace to use upon the wood as it went into the fire, whereby the steamboat was destroyed by fire. *North Penna. R. Co.* v. *Heilman*, 49 Id. 60, where the plaintiff approached a railroad track without looking out for a train. To the same effect is the late case of *Penna. R. Co.* v. *Beale*, 30 Leg. Int. 232, affirming that case, where SHARSWOOD, J., says, "There never was a more important principle settled than that the fact of the failure to stop immediately before crossing a railroad track is not merely evidence of negligence for the jury, but negligence *per se*, and a question for the

court." *Pittsburgh & Connellsville R. Co.* v. *McClurg*, 56 Pa. St. 300, where a passenger in a railway car voluntarily put his arm outside the car window and was injured. *Glassey* v. *Hestonville &c. R. Co.*, 57 Id. 172, where it was held in an action *by a parent*, that he was negligent in law in allowing his son, less than four years of age, to run at large in the street, without a protector. *Empire Transportation Co.* v. *Wamsutta Oil Co.*, 63 Id. 14, where part of the measure of duty resting upon defendants as common carriers was to have perfect car-couplings. The defendants' oil-train caught fire, and by reason of a defective coupling the car containing plaintiff's oil could not be uncoupled, but was consumed, with its contents, although it could otherwise have been saved. The jury were instructed to find for the plaintiff.

To show the limits of the rule in this state, the following cases may be added, which were, under the circumstances, held proper to go to the jury: *Penna. R. Co.* v. *Barnett*, 59 Pa. St. 259 (where the whistle of the locomotive was not sounded at a crossing); *McCully* v. *Clark*, 40 Id. 399 (where the defendants permitted a large heap of burning coal to remain unextinguished, by which the plaintiff's warehouse was destroyed); *Huyett* v. *Phila. & Read. R. Co.* 23 Id. 373 (where fire was communicated by the emission of sparks from a locomotive); *Johnson* v. *Bruner*, 61 Id. 58 (where a servant fell through an open hatchway in defendant's mill); *Johnson* v. *West Chester & Phila. R. Co.*, 70 Id. 357 (where, under peculiar circumstances, the plaintiff stepped on a train in motion); *Kay* v. *Penna. R. Co.*, 65 Id. 269.

In cases involving the question of negligence there are usually two questions to be determined: 1st. What was the measure of duty? 2d. Was this measure complied with? Ordinarily the measure is what a reasonable, ordinarily prudent man would have done under the circumstances. In such cases the standard of duty and the compliance with it, are for the jury, and cases of this kind are not to be taken from them, even, it would appear, when the facts are undisputed: *Penna. Canal Co.* v. *Bentley*, *supra*. In some cases the law defines the measure of duty, and the province of the jury is then only to find whether there was performance of that duty or not, and they are to be so instructed. Or, if the facts are found or undisputed, the court may decide upon the whole case. It is only in this last class of cases that it can properly be said, as has been said in many of the states, that where the facts are found, negligence is a question of law. It will be noticed that the cases above cited are mostly those where it was a question of the plaintiff's contributory negligence. It would seem that the courts are less willing to take the question of defendant's negligence from the jury, and will do so only in the plainest cases. In no cases where the conduct of a party has been impugned as negligent has the court instructed the jury that there was no want of care; *Weil* v. *Express Co.*, 7 Phila. 245, per HARE, P. J.

The remarks of Chief Justice LOWRIE in *Citizens' Insurance Co.* v. *Marsh*, *supra*, will not be out of place in this connection: "It is for comparatively very few of the acts of our lives that the law prescribes any definite rule. It is satisfied for most matters with the general direction to all to do the best they can, in reasonable accordance with the customs of society in regard to it; and it approves, if the act done cannot be condemned when measured by the standard of ordinary care, diligence, faithfulness and skill, and allows emulation and good conscience to surpass that standard as far as possible. * * * The law cannot possibly define how the mechanic shall use his tools, or his materials, or

how the physician shall treat his patient, or what acts or omissions shall constitute proper care and skill, or the want of them, and therefore it must be contented with the loose standard of the ordinary. Judges are not expected to know what is proper care and skill, except in some matters of legal practice, and we can have it defined only for each case as it arises, and then it is done by a jury. * * * Hence we say that questions of ordinary care, diligence and skill are to be decided by the jury. But the ordinary is not always the standard of duty; for often the law defines the very act, and even the form of it, that is to be done in given circumstances, and then there is no question of care, skill or negligence to be submitted to the jury, but simply whether the acts required or forbidden by the law have been done. These views may help to draw the distinction between negligence or carelessness, and misconduct."

CONNECTICUT.—*Beers* v. *Housatonic R. Co.*, 19 Conn. 566, is a leading case. The plaintiff's servant was driving cattle along a public highway at the time when the cars usually passed the crossing, as known to him. The cattle were carefully driven, in the same manner as cattle usually are, but the driver was too far from the crossing to be able to reach it after the cars appeared; many of the cattle were injured by the train. The defendants urged that these facts, which were undisputed, constituted negligence in law on the plaintiff's part. The case was, however, left to the jury, who found for the plaintiff, and a motion for a new trial was refused. STORRS, J., said, in delivering the opinion of the court: "The court could not have pronounced that those circumstances proved the existence of negligence, or a want of due care, on the part of the plaintiff, without encroaching on the rights of the jury. * * * Whether there was negligence or a want of care of whatever degree, was, from its very nature, a question of fact." This case was followed in *Park* v. *O'Brien*, 23 Conn. 339, where the court refused to consider the act of the plaintiff in leaving a spirited horse unhitched and unattended in the street, as concurrent negligence in law. The respective provinces of court and jury in cases of this kind are clearly shown in *Bill* v. *Smith*, 39 Conn. 206, an action for injury caused to plaintiff's dredging-machine, while at anchor, by defendant's propeller. "Negligence, in a legal sense, is the omission of some duty imposed by law; the law determines what the duty is; the evidence in the cause determines whether it has been omitted. The former is a question for the court, the latter for the jury. To illustrate: The *law* requires that when two persons in carriages meet each other upon the highway, each shall turn to the right. Whether he does so or not is a question of *fact*. The *law* requires that a man shall in all cases act with reasonable care; what is reasonable care, and whether a man so acts, are questions of *fact*." That is, the part of a jury is simply to find whether there was compliance with the measure of duty, that measure of duty being in most cases reasonable care, and in the smaller number of cases some more specific line of conduct laid down by the court as a rule of law. In *Knight* v. *Goodyear Manf. Co.*, 38 Conn. 438, where defendants' steam factory whistle made a "terrific, discordant and startling" sound which frightened the plaintiff's horse, a quiet animal, judgment was entered on a case stated for the plaintiff.

NEW HAMPSHIRE.—"Negligence is a mixed question of law and fact to be settled by the jury under the instructions of the court": *Norris* v. *Litchfield*, 35 N. H. 277. See a full discussion of authorities in the very late case of *State* v. *Manch. & Lawr. R. Co.*, 52 Id. 528.

VERMONT.—Negligence is held to be

a mixed question of law and fact, but where the facts are admitted, it becomes a question of law: *Briggs* v. *Taylor*, 28 Vt. 183, per REDFIELD, Ch. J., where it was held negligence in law for a deputy sheriff to leave a carriage which he had levied upon, exposed to the weather from September to April. So in *Trow* v. *Vt. Cent. R. Co.*, 24 Vt. 497, an action for running over plaintiff's horse while at large, it was held that if the jury found that the horse was on the highway by his owner's consent, they should, as a matter of law, have been told to find for the defendant. Where there is no evidence of negligence, the court must so instruct the jury; or must find negligence in law, if the facts necessary to establish it are undisputed: *Barber* v. *Essex*, 27 Vt. 70; see also *Robinson* v. *Cone*, 22 Vt. 225.

GEORGIA.—The Code gives a legal definition of extraordinary diligence, being the conduct of "very prudent and thoughtful persons in preserving their own property." *Held*, under this definition, that "the judge has no right to determine what constitutes negligence:" *Wright* v. *Geo. R. & Banking Co.*, 34 Geo. 338, where the injury was caused by a worn-out rail on defendants' track, by which a train was thrown from the track. To the same effect are *Wallace* v. *Clayton*, 42 Id. 443, and *Macon & West. R. Co.* v. *Winn*, 26 Geo. 250.

MARYLAND.—The question has been much discussed in this state. The language of the court in the principal case is taken from *Balt. & O. R. Co.* v. *Shipley*, 31 Md. 368, the two cases being not unlike. Where there is no legal standard or measure of duty, or where the facts are numerous and complicated, the question of negligence is to be submitted to the jury; but where the legal duty imposed upon the plaintiff is clear and well defined, a failure to perform it will, if found by the jury, constitute negligence in law. *Balt. Pass. R. Co.* v. *Wilkinson*, 30 Md. 233, where the plaintiff stepped off a street car at the front end and was injured: the Court of Appeals held that the jury should have been instructed to find contributory negligence. Similarly held in *North Cent. R. Co.* v. *Price*, 29 Md. 440, an ably argued case, where the equitable plaintiff's husband was struck and apparently killed by a train of cars and by gross neglect, left locked up in defendants' station-house where he bled to death. The defendants were held negligent in law. In *Balt. & O. R. Co.* v. *Fitzpatrick*, 35 Id. 32, the plaintiff, a lad of eleven years, came to a street-crossing where a train was being made up, and seeing an opening of five feet in width, attempted to run through, but was caught and injured. The question arose as to whether his acts constituted contributory negligence. The court, in holding that the case was rightly left to the jury, said, "This court has too often decided to be required again to repeat, that the question of negligence or the want of ordinary care in cases like the present, is one of fact for the jury." In another part of the opinion it was said, "we do not desire it to be understood that in our opinion there are no cases where the question of negligence could be properly one of law for the court. Far from it. Many such cases could be suggested, though they are not of frequent occurrence; but such cases always present some prominent and decisive act, in regard to the nature and character of which no room is left for ordinary minds to differ." In *Balt. & O. R. Co.* v. *Dougherty*, 36 Id. 366, Dougherty was killed by a locomotive while walking along the railroad track at night. It was held, two justices dissenting, that the case had been properly left to the jury. In this case all the earlier authorities were reviewed.

MASSACHUSETTS.—In this state the plaintiff, in actions for negligence, is held in *every case* to show affirmatively

the exercise of due care (*Gaynor* v. *Old Col. R. Co.*, 100 Mass. 211; *Gahagan* v. *Boston & Lowell R. Co.*, 1 Allen 190), a rule which, it would appear, has the effect of withdrawing many cases of this sort from the decision of the jury, because if the absence of negligence is not clearly proven by the plaintiff the court will either grant a nonsuit or direct a verdict for the defendants. In *Gavett* v. *Man. & Lawr. R. Co.*, 16 Gray 501, the plaintiff, a woman of seventy years of age, stepped from the train while in motion and was injured; the court directed a verdict for the defendants. The Supreme Court, per BIGELOW, C. J., said:—"There was therefore no proof of due care, and no facts were shown from which any inference of such care could by possibility be drawn by reasonable men, which would support a verdict for the plaintiff." Similarly in *Lucas* v. *New Bedf. & Taunton R. Co.*, 6 Gray 64. "When, therefore," said HOAR, J., in *Gahagan* v. *Boston & Low. R. Co.*, *supra*, "a plaintiff offers no evidence that he was in the exercise of care, but, on the contrary, the whole evidence on which his case rests shows that he was careless, we have held that the court may rightfully instruct the jury as a matter of law, that the action cannot be maintained." In this case the plaintiff's intestate attempted to cross between two freight-cars shackled together and moving slowly. So in *Callahan* v. *Bean*, 9 Allen 401, where the plaintiff, two years and four months old, was held to be guilty of contributory negligence in being allowed to go unattended across a public street—a decision of great hardship, and one which, in view of all its circumstances, it is believed (and hoped) is not generally followed by other courts. In *Todd* v. *Old Col. R. Co.*, 3 Allen 21, the fact that plaintiff's arm was outside the car window at the time of the accident was alone held to preclude recovery. So held in another appeal by the same parties. *Same* v. *Same*, 7 Allen 208. In *Gaynor* v. *Old Col. R. Co.*, 100 Mass. 212, COLT, J., laid down the rule thus: "When the circumstances under which the plaintiff acts are complicated and the *general knowledge and experience of men do not at once condemn his conduct as careless*, it is plainly to be submitted to the jury. What is ordinary care in such case, even though the facts are undisputed, is peculiarly a question of fact. It is the judgment and experience of the jury, and not of the judge, which is to be appealed to." In *Southworth* v. *Old Col. & Newport R. Co.*, 105 Id. 344, it was held not negligence in law for the plaintiff to leave his horse unfastened and unattended in the street. See also *Mahoney* v. *Metropolitan R. Co.*, 104 Id. 73, and *Fox* v. *Sachett*, 10 Allen 535.

NEW YORK.—In the early case of *Foot* v. *Wiswall*, 14 Johns. 304, an action for running foul of the plaintiff's sloop at night, it was held that the facts were exclusively for the jury; whether they would, when ascertained, warrant the charge of negligence, was a matter of law. But in *Ireland* v. *Plank Road Co.*, 3 Kern. 533, it was held that it by no means necessarily followed because there was no conflict of testimony, that the court was to decide the issue between the parties as a question of law. Both cases were left to the jury. So in *Purvis* v. *Coleman*, 1 Bosw. 326, negligence was said to be commonly called, "though improperly," a mixed question,—to be found by the jury under instructions. However, the court said, in *Keller* v. *N. Y. Central R. Co.*, 24 How. Pr. R. 176, "The question of negligence in all cases involves a question of fact, and it is only when the question of fact is free from all doubt that the court has a right to apply the law without the action of the jury," citing *Bernhardt* v. *Renss. & Saratoga R. Co.*, 32 Harr. 165, to the same point. And in a later appeal of this same case, 23 How. Pr. R. 168,

SELDEN, J., used the following language: "Cases may no doubt arise in which the proof of negligence would be so clear and irresistible that the court would be justified in assuming, without submitting the question to the jury, that negligence was established. At the same time, it must be obvious that such cases must be rare." And again: "It would not be easy to suppose a case," &c. In accordance with this doctrine we find it held to be negligence *per se* to allow a child of four years to go unattended in the street: *Mangam* v. *Brooklyn R. Co.*, 36 Barb. 230. So of a child seventeen months old, (though here there was not negligence on defendant's part, and this point was a dictum), *Kreig* v. *Wells*, 1 E. D. Smith 74, (though not so held of a child eight years old: *Drew* v. *Sixth Av. R. Co.*, 26 N. Y. 49; nor of a child three years old, in charge of a sister nine and a half years old: *Ihl* v. *Forty-second street R. Co.*, 47 Id. 317; nor of one six years old: *Cosgrove* v. *Ogden*, 49 N. Y. 255). In *Sexton* v. *Zett*, 44 N. Y. 430, proof of fact that the defendant dug a ditch across a public sidewalk and allowed it to remain open in the night-time, with no provision for warning travellers, establishes negligence as a matter of law. In *Phillips* v. *Renss. & Saratoga R. Co.*, 57 Barb. 652, it was said that ordinarily to get upon a train while in motion is negligence *per se*, but that circumstances may justify doing so, as was the case there. So in *Filer* v. *N. Y. C. R. Co.*, 49 N. Y. 47. In *Thrings* v. *Central Park R. Co.*, 7 Rob. 616, the plaintiff, a boy, was injured while attempting to get on a train in motion. There were no palliating circumstances; a nonsuit was therefore ordered. In *Brooks* v. *Buf. & Niagara R. Co.*, 25 Barb. 600, where plaintiff drove his team upon the track and stopped there to see if a train was coming, it was held error not to have nonsuited him, although there was evidence of defendants having been negligent. So in *Haring* v. *N. Y. & E. B. Co.*, 13 Barb. 9, where the plaintiff drove across the track at the rate of a mile in about four minutes, approaching the track between high embankments. There was negligence on defendants' part, but a motion to set aside a nonsuit was denied. So where plaintiff drove across a track on a trot, without taking any precaution to learn whether a train was approaching, it was held that he ought to have been nonsuited: *Dascomb* v. *Buff. & State Line R. Co.*, 27 Barb. 22. See also *Davis* v. *N. Y. C. B. Co.*, 47 N. Y. 400; *Delafield* v. *Ferry Co.*, 5 Rob. 207, and *Willis* v. *Long Isl. R. Co.*, 34 N.Y. 616.

MICHIGAN.—Negligence is a question of fact, but where negligence on the plaintiff's part is the only inference that can be drawn from the evidence, the jury may be instructed to find for the defendant: *Detroit & Milw. R. Co.* v. *Van Steinburg*, 17 Mich. 99. A person about to pass a railroad track is bound to ascertain whether a train is approaching; if he fails to do so, but ventures blindly on the track, his conduct is negligence in law: *Lake Shore & Mich. South. R. Co.* v. *Miller*, 25 Id. 274.

DELAWARE.—Negligence is a question of fact for the jury: *Burton* v. *Phila., Wilm. & Balt. R. Co.*, 4 Harr. 252.

NEBRASKA.—It is the duty of the court to tell the jury what facts will amount to negligence, and to leave it to the jury to find whether such facts have been found or not: *Meyer* v. *Midland Pac. R. Co.*, 2 Nebr. 319.

ILLINOIS.—Negligence is a question of fact, except where it consists in the omission of a duty imposed by positive requirement of law: *Toledo, Peoria & Warsaw R. Co.* v. *Foster*, 43 Ill. 417, where the question arose as to whether a locomotive whistle should have been sounded or not at a crossing. See also

Gal. & Chicago R. Co. v. *Dill*, 22 Id. 271, and *Chi. & Rock Isl. R. Co.* v. *McKean*, 40 Id. 218. Where a parent allowed a child of four years of age to go unattended on the street, *Chicago* v. *Magor*, 18 Id. 349; and where defendants allowed dry grass to accumulate upon their right of way, *Ill. Cent. R. Co.* v. *Nunn*, 51 Id. 78; *S. P., O. & M. R. Co.* v. *Shawfelt*, 47 Id. 497; see *Pfau* v. *Reynolds*, 53 Id. 212. It *seems* to have been held negligence in law to run a train of cars at a high rate of speed through the street of a village: *Chi. & Alton R. Co.* v. *Gregory*, 58 Id. 226. The practice in Illinois of assigning for error the refusal of the court below to grant a new trial, obliges the Court of Appeal to discuss questions of both law and fact and renders it difficult in these cases to distinguish between evidence upon which the *jury* would be allowed to find negligence, and negligence *per se:* see *Chi. & Alton R. Co.* v. *Quaintance*, 57 Id. 389.

TENNESSEE.—Where the defendants, owners of a steam paper-mill, left two cogwheels running, about two feet above the ground, and twenty feet from a street, without any cover, guard or enclosure whatever, and with no one in charge of them, notwithstanding the fact that children were in the habit of playing about every day, and the plaintiff, a child three years of age, was caught in the wheels and crushed, it was *held*, that the court ought to have instructed the jury, as a matter of law, to find for the plaintiffs: *Whirely* v. *Whiteman*, 1 Head. 610.

WISCONSIN.—Negligence is a conclusion of fact to be drawn by the jury, under the instruction of the court. But where there is an entire absence of proof of negligence, or where the plaintiff's own proof shows negligence on his part, a nonsuit is properly ordered: *Laughoff* v. *Milw. & P. du C. R. Co.*, 19 Wisc. 497, where, upon appeal from a nonsuit, it was held that the jury should have been allowed to decide whether a woman was negligent in trying to cross before two trains which were unlawfully racing through the main street of a town. In *Spencer* v. *Same*, 17 Id. 487, the plaintiff had his arm outside the car window and was injured; *held*, that he was not negligent in law for so doing. In *Rothe* v. *Milw. & St. P. R. Co.*, 21 Id. 256, where the plaintiff came down the steps of a mill upon a railroad track, with two bags of grain on his shoulder and was run over, and at the trial was nonsuited, there seems to have been no negligence on the part of defendants. The act of the defendants' servants in making a "running switch" in the populous part of a town, with no person in charge on the front end of the loose cars, was held negligence in law: *Butler* v. *Same*, 28 Id. 487. *Kellogg* v. *Chicago & N. W. R. Co.*, 26 Id. 229, followed the Illinois cases, *supra*, in holding it not negligence *per se*, to allow dry grass to accumulate on the way of a railroad. See also *Detroit & Milw. R. Co.* v. *Curtis*, 23 Id. 152.

UNITED STATES.—*Sioux City & P. R. Co.* v. *Stout*, is a very recent case, 17 Wall. 637, HUNT, J., there says: "It is true that where the facts are undisputed the effect of them is for the judgment of the court and not for the decision of the jury. This is true in that class of cases where the existence of such facts comes in question, rather than where inferences or deductions are to be made from the facts. * * * In some cases too the necessary inference from the proof is so certain that it may be ruled as a question of law. If a sane man voluntarily throws himself in contact with a passing train, there being nothing to counteract the effect of this action, it may be ruled as a matter of law that the injury to him resulted from his own fault. * * So if a coach driver intentionally drives within a few inches of a precipice, and

an accident happens, negligence may be ruled as a question of law. On the other hand if he had placed a suitable distance between his coach and the precipice, but by the breaking of a new iron axle, which could not have been anticipated, an injury occurred, it might be ruled as a question of law that there was no negligence and no liability. But these are extreme cases. The range between them is almost infinite in variety and extent. It is in relation to these intermediate cases that the opposite rule prevails. Upon the facts proven in such cases, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may presume to be clearly established from which one sensible, impartial man would infer that negligence existed; another man equally sensible and equally impartial would infer that there was no negligence. It is this class of cases, and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer, these sit together, consult, apply their separate experience of the affairs of life to the facts found, and draw an unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge. * * * We find, though not uniform or harmonious, that the authorities justify us in holding in the case before us, that although the facts are undisputed, it is for the jury and not for the judge to determine whether proper care was given, or whether they establish negligence."

ENGLAND.—It was said by Lord BROUGHAM in *Tobin* v. *Morrison*, Moore P. C. 126, that "The matter of law and the matter of fact must be kept separate; without the severance of the two neighboring provinces of judge and jury, the trial by jury cannot in any intelligible and consistent sense be said to exist * * yet in the present instance, the action being for negligence, the special verdict finds facts and leaves the court to say whether negligence has or not been proved. Negligence is a question of fact, not of law, and should have been disposed of by the jury." The numerous discussions in the English courts on the subject of negligence, all seem to arise upon the question whether there was any evidence of negligence to go to the jury. See for example, *Smith* v. *London & S. W. Ry. Co.*, L. R. 5 C. P. 98, where upon a verdict for plaintiff with leave to enter a motion for nonsuit, if the court should be of opinion that there was no evidence of negligence which ought to have been submitted to the jury, the court complains that "great difficulty is thrown upon the judges, who are called upon to determine questions of this sort, which make them too much judges of facts." In all cases the English courts seem to adhere strictly to the maxim, *Ad quæstionem facti non respondent judices, ad quæstionem legis non respondent juratores:* Broom Leg. Max. 102. In *Patterson* v. *Wallace*, 1 McQueen H. of L. Ca., there was no controversy about the facts, but only a question whether certain facts proved established negligence. The judge at the trial withdrew the case from the jury, but it was held to be a pure question of fact for the jury and the judgment was reversed.

This summary of the decisions in America and England, shows that in most cases the question of negligence is one to be submitted to the jury, upon the question of reasonable care under all the circumstances of the case.

Evidence of gross acts of carelessness, and entire disregard of safety has, however, in some of the states been held to withdraw cases from the province of the jury. These are usually upon the part of the plaintiff. The policy of this rule may be doubted; it is not too much to say that it ought not to be extended beyond narrow limits. If the evidence of negligence is such as shocks the mind of the court, it is not likely that twelve reasonable men will find ordinary care on the plaintiff's part, and all such questions, it is thought, can safely be left to them. To confuse the province of the court with that of the jury will result, it is feared, in introducing uncertainty into the law, and in a consequent increase of litigations; as can be readily shown by the number of cases in the books in which an appeal has been taken for the refusal of the court to decide upon negligence as a matter of law where the jury has found that there was no negligence, or in which the court has held the measure of duty too strongly against a party, and withdrawn the case from the jury.

In cases where the law has imposed a plain duty upon a person, other than the usual one of ordinary, reasonable care under all the circumstances of the case, cases might, more properly, be withdrawn from the jury upon undisputed facts. These, it is suggested, are usually cases in which the duty is one arising out of some public relationship to other persons, as that of railroad companies to passengers, where the measure of duty is not ordinary care, but something much more definite and specific, and capable of exact legal definition. There the court defines the duty, and the jury have only to find compliance or not. If the measure of duty is simply a proper regard for one's own safety, or one's own property, there can be no standard but ordinary care. The best tribunal to decide that question, whether the facts are disputed or not, is the jury.

The words of one of the judges and sages of the law, may often be called to mind with profit: "It is of the greatest consequence to the law of England, and to the subject, that the powers of the judge and jury be kept distinct; that the judge determine the law, and the jury the fact; and if ever they come to be confounded, it will prove the confusion and the destruction of the law of England:" Lord HARDWICKE, in *Rex.* v. *Poole*, Cases temp. Hard. 28.

F. R.

Supreme Court of Pennsylvania.

APPEAL OF BELLE D. FOSTER.

Where partners purchase real estate with the money of the firm as partnership property, upon the settlement of the partnership business brought about by the death of one of the members of the firm, the proceeds of the sale of the interest of the deceased partner in such real estate is to be regarded as land remaining in specie, after discharging its liabilities as partnership stock; and the widow of such deceased partner is entitled to an interest therein for her life only.

JOHN FOSTER died in August 1871, intestate. He left surviving him a widow, the appellant Belle D. Foster, who administered upon his estate, and five children. At the time of his death, and prior thereto, said John Foster and Samuel M. Kier were